United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1042

To be argued to
LEWIS R. FRIEDMAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

FERNANDO PADRON, RUBEN LOPEZ and WALTER SINTSCHA,

Defendants-Appellants.

BRIEF FOR APPELLANT RUBEN LOPEZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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STATEMENT

Ruben Lopez appeals from a judgment of the United States District Court for the Southern District of New York rendered by Judge Milton Pollack on January 28, 1976. The decision is not reported.

Ruben Lopez was convicted, pursuant to Title 21, United States Code, Section 846 of a conspiracy to possess with intent to distribute quantities of a narcotic drug controlled substance. Lopez was also convicted pursuant to Title 21, United States Code, Section 841 of possession with intent to distribute these substances.

Lopez received a sentence of two years on each count, to be followed by three years special parole; the sentence on each count to be concurrent. Mr. Lopez is incarcerated in lieu of bail.

QUESTIONS PRESENTED

1. Whether at least a hearing was required before the defendant's post-trial motion based upon counsel's post-trial observation of documents which arguably should have been turned over to the defense.

2. Whether an indigent defendant represented by assigned counsel has a constitutional right to appear as co-counsel in his own defense.

3. Whether an indigent defendant's pre-trial request to appear as co-counsel in his own defense can be summarily denied without inquiry.

STATEMENT OF THE CASE

In a seven count indictment filed by a Grand Jury in the United States District Court for the Southern District of New York on September 25, 1975, the appellant Ruben Lopez, along with Walter Sintscha, Edward Montiell, Armando Delbarrio, Paula Delbarrio, and Fernando Padron, were jointly charged with one count of a conspiracy to violate Title 21, United States Code, Sections 812 and 841 and, individual defendants were charged in substantative violation of Title 21, United States Code, Section 841. It was alleged to be part of the conspiracy that the defendants would possess with intent to distribute certain Schedule I narcotic drug controlled substances.* Counts two, four and six** charged Sintscha with

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*Actually the only proof at trial related to cocaine, a Schedule II drug.

**As originally numbered Sintscha was charged in count seven. Since count six related to the Delbarrios only, it was severed before trial and count seven was renumbered.

possession with intent to distribute a Schedule II narcotic drug controlled substance. Counts three and five jointly charged Sintscha and Lopez with the same offense. Count four was dismissed as to Padron before trial. Montiell was also charged in count four.

Lopez, through court appointed counsel, filed a pre-trial motion, which inter alia sought the suppression of a post-arrest statement and the right to appear as co-counsel in his own defense. Judge Pollack conducted a hearing solely on the admissibility of the statement and denied that portion of the motion. With respect to Lopez's motion to appear as co-counsel, the court, despite the Government's consent, denied it without conducting any inquiry and without opinion. See Appendix filed by Lopez and Padron, Document D.

The trial of Lopez, Sintscha, Montiell and Padron commenced before Judge Milton Pollack and a jury on December 5, 1975. The Government's proof consisted of the testimony of an undercover officer, Stephen Caracappa, a New York City detective assigned to the New York Drug Enforcement Task Force and the members of his covering team as well as recorded telephone conversations between Caracappa and Sintscha. Detective Caracappa testified that on the evening of July 10, 1975, he was introduced by an informer to Walter Sintscha from whom the detective purchased one-quarter of an ounce of cocaine for $475 (Tr. 137-40).

July 22, Caracappa telephoned Sintscha, and the two arranged to meet that day at a bar, where they discussed the purchase of one ounce of cocaine for $1,600, a transaction that was completed the next day (Tr. 142-7).

While at Sintscha's apartment on July 24, Caracappa met Fernando Padron, who offered to sell the officer cocaine and "ups and downs". Sintscha arrived soon after and told Caracappa that the officer could purchase two four-ounce packages of cocaine the next day; one package would be delivered in Manhattan for $4,800 and the other in Queens for $3,500 (Tr. 150).

The next day Caracappa and Sintscha drove to 169th Street and Hillside Avenue in Queens and, after meeting Padron and Armando Delbarrio, followed Delbarrio's car to Delbarrio's apartment. A few hours later, Montiell arrived with a package of cocaine, which was "short on weight," and the transaction was completed (Tr. 151-4, 264).

On August 6, Sintscha introduced Caracappa to Ruben Lopez, whose name Sintscha said was "John." Lopez, who told the officer that he had furnished the one ounce of cocaine that Sintscha had previously sold to Caracappa, offered Caracappa half a kilogram of cocaine with payment "up front." Caracappa said that he would buy two ounces but would pay only after he saw the drugs (Tr. 161-2).

The next day, Caracappa met Sintscha at 84th Street and Columbus Avenue in Manhattan and, in the apartment, purchased a quantity of cocaine, which he saw Lopez hand to Sintscha, for $3,000, which Sintscha handed to Lopez. The package of cocaine, received

in evidence as Government's Exhibit 9 at the trial, bore the notation Exhibit 4, which was written on the package by the officers. Additionally, while this particular package was purchased on August 7 (348), the date written on the exhibit package by the officers was August 6.* Lopez also told Caracappa that Lopez could obtain more cocaine but needed the money in advance. Caracappa did not agree (Tr. 163-201).

On August 18, Caracappa met Sintscha and Lopez at their new apartment near Park Avenue and 22nd Street with $18,000, a sum which was to be used for payment of a half-pound of cocaine, a deal which Caracappa and Sintscha had discussed five days earlier. The money was shown to Lopez who told the officer that the "connection" would be a little late; Lopez then went to his apartment, where Caracappa saw him conversing with an unidentified individual. Lopez then returned, telling Caracappa that the deal would have to be postponed (Tr. 166).

The next day, Sintscha and Caracappa met on 23rd Street and 2nd Avenue, but there was another delay in completing the purported transaction. Shortly thereafter Sintscha came out of his apartment with an Hispanic female, who identified herself as Lopez's girlfriend. After she made a telephone call, Sintscha told the officer that the package would arrive in a little while, but Lopez arrived soon after to say that the deal would have to be set up at another time (Tr. 167-8).

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*This particular exhibit, as well as all the other drugs purchased by the officer, are presently in the custody of the Government.

On August 25, Caracappa told Sintscha that he would not meet him again unless Sintscha had the drugs in hand. The officer spoke to Sintscha during recorded telephone conversations on August 28 and again twice on September 4, at which time Sintscha indicated that the deal was off. On September 9, however, Sintscha told Caracappa that he would have "something the next day" so the two arranged to meet at Sintscha's apartment the following afternoon. When Caracappa arrived, Sintscha told him that "John" would be coming with the package, and, twenty minutes later, Sintscha went downstairs -- Sintscha shared his duplex apartment with Lopez, who occupied the downstairs area -- and returned with a package containing one-quarter of an ounce of cocaine. Sintscha told Caracappa to pay for the drugs, indicating that the officer would receive the rest after payment was made. Sintscha then took the officer out to his car, where Caracappa placed Sintscha under arrest (Tr. 170-3, 209).

The remainder of the Government's proof consisted of the testimony of the members of the covering team, who included Patrick Bradley, the Drug Enforcement Administration case agent. Agent Bradley testified that on July 23, the day Caracappa made his initial purchase from Sintscha, Lopez was observed driving in Sintscha's car and was followed from Sintscha's residence on 84th Street to 44th Street and Lexington Avenue and then to the Queens Midtown Tunnel. Bradley then returned to 84th Street, where he later saw the car that Lopez was driving parked on the East Side of Columbus Avenue (Tr. 22-5, 67-70).

On August 18, the day Caracappa met Sintscha with $18,000 to be paid for the half-pound of cocaine that Sintscha had mistakenly informed the officer would be delivered to him that day, Agent Bradley observed that Lopez, after seeing Caracappa display the money, got into his car and drove to an apartment building in Queens.

Bradley testified that the telephone books seized from Padron and Sintscha on their arrest were in the original sealed envelopes until he opened the seal, a few days before trial, in the presence of the trial prosecutor, Mr. Batchelder.

Mr. Lopez called as his only witness Assistant United States Attorney Thomas E. Engel, the prosecutor originally assigned to the case, who testified that he had opened the evidence envelope containing the telephone books for defense counsel, about one month prior to trial (Tr. 335-9).

The jury acquitted Mr. Lopez on count four, charging the July 22 transfer, and convicted him on counts one and five.

Prior to sentence Lopez moved for a judgment of acquittal and a new trial alleging, inter alia, that, while the jury was deliberating, counsel had seen on the table in front of Agent Bradley a document which appeared to be notes not previously turned over to the defense. The court denied the motion without a hearing stating that all 3500 material had been turned over and that counsel was raising a "sham issue." See Appendix filed by Lopez and Padron Document F.

POINT I

IT WAS ERROR TO DENY WITHOUT A HEARING LOPEZ'S MOTION FOR A NEW TRIAL BASED ON APPARENTLY UNDISCLOSED JENCKS ACT MATERIAL.

The denial of Lopez's motion for a new trial was improper, because the District Court refused to conduct an evidentiary hearing on the allegation that the Government improperly failed to disclose certain documents and papers, arguably discoverable by the defense under the Jencks Act, 28 U.S.C. §3500, and Section 612 of the Federal Rules of Evidence.

At the trial, Special Agent Bradley, the case agent in charge of the investigation, when asked on cross-examination to describe the materials he reviewed before testifying, referred to certain handwritten notes he had made and to several D.E.A. No. 6 forms, consisting of serveillance reports which he had prepared concerning his observations in this case. The agent testified unequivocally that he knew of no other notes in the case (Tr. 72-4). "What I used for my testimony is right in front of Mr. Batchelder [the trial prosecutor]". The only other notes might be "a rough" (TR. 74). Mr. Batchelder had stated that defense counsel "has everything we have in our file. He has had it for three days." (Tr. 73).

In support of the motion for a new trial, an affidavit filed by Lewis R. Friedman, Esq., Lopez's trial attorney, alleged the following:

> "8. During the deliberations of the jury, I was examining certain of the exhibits which had been marked in evidence. As I was looking at those matters, I observed a document upon the table in front of where Special Agent Bradley had been seated during the entire trial, the document, which appeared to be a carbon copy

of a typed paper, had what appeared to be question and answer form of testimony relating to Special Agent Bradley's observations. Although I was unable to peruse the document, I observed enough of it to note that the questions on the page that I saw appeared to be the same questions asked by the attorney for the Government on direct examination. After each question appeared an outline of the observations allegedly made by Special Agent Bradley and a notation as to the 3500 Exhibit which contained the information. On the first page of the document I observed was also a bracketed reference which appeared to be a direction to the witness to point out in the courtroom 'J.D. No. 1 . . .' I was unable to observe more of the document than is described herein, other than to note that in the upper left hand corner of the page appeared what may well have been the initials of the prosecutor trying the case for the Government.

"9. If, as it appears, the document was a prior statement by Special Agent Bradley which he used in the course of his preparation for trial, the answers the Special Agent gave on the stand were false. At the very least, the document would have been withheld from the defense in violation of 18 U.S.C. 3500, and Federal Rule of Evidence 612. Also, the failure of the Government to correct the testimony as given, would constitute a denial of the defendant's rights, particularly if the document was actually one prepared at the request or with the knowledge of the prosecutor.

"10. The failure to turn over such a document would be substantially prejudicial to defendant Lopez since a large part of a defense was directed toward the impeachment and discrediting of Special Agent Bradley." Appendix filed by Lopez and Padron, Document F.

In response to these allegations, Harry C. Batchelder, Jr., Esq., the Assistant United States Attorney who tried the case for the Government, filed an unsworn memorandum; Mr. Batchelder asserted that the papers seen by Mr. Friedman at the counsel table consisted of the "traditional prosecutor's witness outline which is used by all assistants. I prepared this outline without agent [Bradley's] assistance and reviewed the contents as an aid in preparing my

summation. These documents are still in existence and I will produce them for the court's review if it so requires." Id. at G.

It appears from the decision that Judge Pollack did not see the documents, which have not been shown to defense counsel. In any event, in his memorandum denying the motion, Judge Pollack wrote that all of the "3500 materials were all turned over to the defendant in advance of the witness Bradley"; the court further held that "the notations whosever they were" did not constitute "further 3500 material and the defendant's counsel raises a sham argument." Id. at F.

The district court's treatment of the motion was improper. Initially, the court's analysis of the moving and answering papers was plainly inadequate. To the extent that Judge Pollack relied on Mr. Batchelder's description of the papers cited in Mr. Friedman's affidavit, the court should not have attached any weight to the assistant's unsworn allegations. Beyond this, the record before the court below does not support Judge Pollack's summary conclusion that the papers in question were not 3500 materials. Assuming, as asserted by Mr. Batchelder in his memorandum, that the papers were prepared by the prosecutor for his own use during the trial, it does not follow that these documents were not producible "statements" within the meaning of the Jencks Act, 28 U.S.C. §3500. Indeed, Mr. Batchelder's description of the papers gives every indication that they should have been disclosed to Lopez's attorney. See Goldberg v. United States, ___ U.S. ___, 18 Cr.L. 3161 (1976).

In Goldberg, the Supreme Court ruled that any writing prepared by a Government lawyer relating to the testimony of a Government witness that was signed or otherwise adopted or approved by that witness must be disclosed under the Jencks Act. Further, the court noted that the writing is not rendered non-producible merely because the Government lawyer wrote the statement during an interview with that witness. Here, Mr. Batchelder stated that he prepared the papers seen by Mr. Friedman for his own use during the trial. Accordingly, if, as appears from the descriptions of the documents given by Mr. Friedman and Mr. Batchelder, the contents of the prosecutor's "outline" related to the subject matter of Agent Bradley's or any other Government witness's testimony, and that witness signed, approved or adopted the contents of the statement, Mr. Batchelder was under a duty to disclose the statement to the defense. Mr. Batchelder's memorandum hints that the papers in question were actually used by Agent Bradley in preparing his testimony -- the "documents are not 3500 material even though a witness may have read them to refresh his recollection" Appendix filed by Lopez and Padron, Document G. Compare Fed. R. Evid. 612.

On the current incomplete record, no clear cut determination can be made with respect to the nature of the documents seen by Mr. Friedman. Such a determination can be made only after an adequate evidentiary hearing, which the Supreme Court in Goldberg indicated, should be undertaken in the first instance by the District Court and not the Court of Appeals. See Goldberg v. United States, supra, 18 Cr.L. at 3165-6. The only question here is whether the allegations contained in Mr. Friedman's affidavit were sufficient to raise a question whether producible statements under the Jencks Act

were not disclosed by the Government to the defense. See Campbell v. United States, 365 U.S. 85 (1961). Undeniably, Mr. Friedman's affidavit met this evidentiary burden.

The attorney alleged that the documents in question were on the counsel table directly in front of the chair where Agent Bradley was sitting during the trial. Additionally, though, as alleged by Mr. Friedman, the attorney did not peruse the entire document, he saw enough of it to conclude that the document contained questions posed by the Assistant United States Attorney during his direct examination and that the document also contained observations, which Agent Bradley testified during the trial he made in this case. As also alleged by Mr. Friedman, the document also contained a "bracketed reference which appeared to be a direction to the witness to point out in the courtroom 'J.D. No. 1 . . . '" These allegations were plainly adequate to raise a question concerning the Government's compliance with the provisions of the Jencks Act.

Should this court conclude that a hearing, as described above, is in order, the District Court should determine whether, assuming Mr. Lopez was improperly denied access to certain discoverable statements, the non-disclosure of these statements was deliberate, as an analysis of Mr. Batchelder's memorandum clearly suggests. The Government attorney conceded that he prepared the documents and that he did not disclose these documents to the defense.

Too, if the Government deliberately failed to disclose statements discoverable under either the Jencks Act or Rule 612 of the Federal Rules of Evidence, Mr. Lopez, in all probability, would be

entitled to a new trial. In reviewing suppression of evidence claims, this court has always measured the nature of the suppression against the materiality of the evidence that was not disclosed to the defense. See, e.g. United States v. Keogh, 391 F. 2d 138 (2d Cir. 1968). "The standards governing the grant of a new trial vary according to the extent of the Government's culpability. If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable." United States v. Morell, 524 F. 2d 550, 553 (2d Cir. 1975). See also United States v. Rosner, 516 F. 2d 269 (2d Cir. 1975); compare Giglio v. United States, 405 U.S. 150 (1972). Also, the court has ruled that the Government's deliberate failure to disclose Jencks Act material is grounds for a new trial if the "statement" is material to the case in which the non-disclosure took place. United States v. Hilton, 524 F. 2d 164, 166 (2d Cir. 1975).

The theory of the defense at trial was that Mr. Lopez's participation in the alleged scheme was uncorroborated and that the August 7 transfer to Detective Caracappa did not actively involve Mr. Lopez. In support of that theory Lopez showed that the drugs in evidence were in an altered evidence container, dated the day prior to the transfer. Agent Bradley had initialed the defective labels. Bradley's credibility had been impeached by the testimony of Assistant United States Attorney Engel as to the condition of still other evidence. Therefore, if defense counsel were given

access to documents which could raise further infirmities in the testimony of the chief investigative agent, the jury might well have reached a different conclusion as to Lopez's participation.

Judge Pollack's conclusion that the papers did not constitute 3500 material -- at least in the absence of an evidentiary inquiry that would establish whether these papers lie within the definition of a producible "statement," as that term was recently redefined and expanded by the Supreme Court, was therefore incorrect and prejudicial.

POINT II

THE DISTRICT COURT'S REFUSAL, WITHOUT INQUIRY, TO DENY LOPEZ'S PRE-TRIAL MOTION TO APPEAR AS CO-COUNSEL IN HIS OWN DEFENSE WAS ERROR.

Prior to trial, counsel for Mr. Lopez made a motion which sought inter alia the right for Mr. Lopez to appear as co-counsel in his own defense. In response to that motion, the memorandum of the Government stated "the Government in light of the Supreme Court's holding in Faretta v. California, 43 U.S. L.W. 5004 (June 30, 1975) has no option but to consent to Mr. Lopez acting as his own co-counsel provided he is apprised of the ramifications of his actions." Appendix filed by Padron and Lopez, Document E. Judge Pollack merely endorsed the papers motion "denied." Id. at D. This ruling was incorrect. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975) confers the right sought by Mr. Lopez here.

Faretta held that an indigent defendant cannot be forced to accept assigned counsel and deprived of the right to defend himself.

As the Supreme Court noted "We confront here a nearly universal conviction, on the part of our People as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truely wants to do so." 95 S. Ct. at 2532. "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense." Id. at 2533. Implicit in Faretta is the right of the indigent accused partially to participate in his own defense; and partially to exclude the services of assigned counsel. Indeed, the Supreme Court noted that approximately thirty-three states accord the accused the right to be heard in person and by counsel. See 95 S. Ct. at 2530, n. 10.

Although Judge Pollack's reasoning cannot be ascertained in the case at bar, the judge, in a prior decision, decided after Faretta, outlined his rationale for denying such a motion. In United States v. Swinton, 400 F. Supp. 807 (S.D.N.Y. 1975), Judge Pollack concluded that the pre-Faretta principle that the decision whether to allow a defendant to act as co-counsel was within the discretion of the trial court was still the rule after Faretta. cf. United States v. Private Brands, 250 F. 2d 554, 557 (2d Cir. 1957), cert. denied, 355 U.S. 957 (1958). However, it appears that the pre-Faretta decisions of this Court and the other circuits which have considered the question of co-counsel status for the defendant did so in the context of the federal statutory right 28, U.S.C. §1654, and not on the constitutional, Sixth Amendment, rationale provided in Faretta. Thus, although the Supreme Court

in Faretta did not squarely deal with this point, the suggestion that assigned counsel be available on a standby basis to defendants who waive their right to counsel, [Faretta v. California, supra, 95 S. Ct. at 2541 n. 46] a procedure which is in many respects similar to allowing the defendant to appear as co-counsel in his own behalf [see United States v. Swinton, supra at 808 n. 3] is a strong suggestion that sound reasons are required for the denial of a defendant's asserted right to act as co-counsel. There were no reasons here. The application by counsel below indicated that Mr. Lopez would not in any way disrupt the proceedings, and, while the Government's concession on the law below is, of course, not binding on this Court [United States v. Tortorello, ____ F. 2d ____, slip op. 2878, 2883 (2d Cir. 1976)], it is strong proof that the Government did not believe that Mr. Lopez would in any way hinder the conduct of the trial by appearing as co-counsel on his own behalf.

Nor is this Court's decision in United States v. Wolfish, 525 F. 2d 457 (2d Cir. 1975) necessarily to the contrary. In Wolfish and in Swinton the courts were dealing with a situation where the defendant had made an affirmative choice to retain counsel to represent them. Mr. Lopez, an indigent, did not have that right, since the court had assigned counsel for him. In the case of an indigent, for whom counsel is provided without his participation in the selection process, or, perhaps, without his acquiescence, the right to actively participate in his own defense is of more importance

to the exercise of his Sixth Amendment rights than in the case of a man who has chosen to retain counsel.

Although counsel know of no federal cases granting the right sought here, an analysis of Faretta supports the conclusion that the partial exercise of the right to defend oneself in a criminal proceeding is guaranteed by the Sixth Amendment as a concommitant to the right to conduct the entire defense. The denial of Mr. Lopez's motion in the absence of any inquiry into the factors surrounding the request, or without a statement of reasons by the judge denied Mr. Lopez the right to the effective assistance of counsel.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED OR, IN THE ALTERNATIVE, A HEARING ON THE DEFENDANT'S MOTION FOR A NEW TRIAL SHOULD BE GRANTED.

Respectfully submitted,

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HERMAN KAUFMAN
of counsel

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK

Patricia Loughlin being duly sworn, deposes and says, that on the 21st day of April 1976 she served the within Brief for Appellant Ruben Lopez on Darnell Blackett Attorney for Walter Sintscha by enclosing a true copy thereof in a securely sealed postage paid wrapper and depositing the same in a Post Office box regularly maintained by the United States Government at No. 120 Broadway, in the Borough of Manhattan, City of New York, directed to said Attorney at 401 Broadway, New York, New York 10013

Sworn to before me, the
21st day of April 1976

Margaret L. Eirman

MARGARET L. EIRMAN
Notary Public, State of New York
No. 24-4606127
Qualified in Kings County
Commission Expires March 30, 1977

Patricia Loughlin

Patricia Loughlin